No. 14,744

United States Court of Appeals

For the Ninth Circuit

DONALD M. WOLLAM,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an appeal (R 32) from a judgment of conviction (R 31) for violation of 2 U.S.C.A. 192 by reason of appellant's alleged failure to answer certain questions propounded to him at a hearing of a Subcommittee of the House Committee on Un-American Activities. Appellant was sentenced to one year's imprisonment on each of five counts, the sentences to run concurrently, and to pay a fine of $250 on the first count (R 32).

JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court over the alleged offenses is conferred by 2 U.S.C.A. 192. The

jurisdiction of this Court over this appeal is conferred by 28 U.S.C.A. 1291, 28 U.S.C.A. 1294(1), and F.R. Crim. Pro. 37(a).

STATUTE INVOLVED.

The pertinent statute involved, 2 U.S.C.A., Section 192, provides as follows:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

STATEMENT OF THE CASE.

On June 19, 1954, appellant was called to testify as a witness before a widely publicized hearing of a Subcommittee of the House Committee on Un-American Activities at Portland, Oregon.[1] Prior to the

[1]The Subcommittee had just previously concluded hearings at Seattle, Washington. Convictions of contempt against two witnesses involved in the Seattle hearings were recently reversed by this Court. *Jackins v. United States,* 231 F.2d 405 (C.A. 9), and

assumption of the stand by appellant, the chairman had announced that it was the Subcommittee's purpose "to investigate Communist and subversive activities in this area [Portland]" (R 49).[2] The chairman further announced that "the Communist Party . . . is a conspiracy. It is designed to overthrow our form of government by force and violence."[3]

In addition to these statements by the chairman, there had been statements by Committee staff members, released just prior to the hearings and publicized in the Portland press, to the effect that the hearings would cover "general subjects" with perhaps some

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Starkovich v. United States, 231 F.2d 411 (C.A. 9). Earlier the Subcommittee had conducted hearings in San Francisco, and a contempt conviction arising out of those proceedings was likewise reversed here. *Fagerhaugh v. United States,* 232 F.2d 803 (C.A. 9).

[2]The Subcommittee was operating pursuant to the provisions of Public Law No. 601, 79th Cong., and of House Resolution No. 5, adopted by the 83rd Congress, January 3, 1953 (Ex. 3). That law and that resolution purportedly authorized investigation into "Un-American propaganda activities . . . [and] . . . the diffusion . . . of subversive and Un-American propaganda . . ." See *infra,* p. 13.

[3]Hearings before the Committee on Un-American Activities. House of Representatives, 83rd Cong., 2d Sess., "Investigation of Communist Activities in the Pacific Northwest—Part 9 (Portland)", June 18, 1954, p. 6605. Although only portions of the entire transcript of the Portland proceedings were received in evidence below, clearly this Court may judicially notice the entire official records of a Congressional Committee. *Greeson v. Imperial Irrigation District,* 59 F.2d 529, 531 (C.A. 9); *Red Canyon Sheep Co. v. Ickes,* 98 F.2d 308 (C.A. D.C.); *Fletcher v. Jones,* 105 F.2d 58 (C.A. D.C.); *Cf. Tempel v. United States,* 248 U.S. 121, 130; *Home Building and Loan Association v. Blaisdel,* 290 U.S. 398, 444.

For the convenience of the Court, excerpts from the transcript of the proceedings in Portland are attached hereto as an appendix. These excerpts will be cited herein as "Hearings". For the testimony of appellant see notes 7a and 27-31, *infra.*

emphasis on education'' and would be concerned with ''proposals to prevent Communist domination of labor unions'' (R 84). When the hearing convened, the courtroom and the corridors were swarming with law enforcement officers including those who specialized in ''ferreting out subversion'' (R 85).[4]

Before appellant was called as a witness, three so-called ''friendly'' witnesses had given testimony. One, Barbara Hartle, had testified generally about the ''Communist conspiracy'', had given it as her opinion from a longtime association in the Communist Party that the party advocated the overthrow of the Government by force and violence, had testified about the Communist Party's ''concentration'' in the maritime industry (Hearing, p. 6649), and about Communist Party units at Reed College in Portland (Hearings, p. 6645). This witness testified concerning Communist Party activities among *high school* students as well (Hearings, p. 6645), and she also testified that the Civil Rights Congress was a Communist front organization (Hearings, pp. 6636-38).[5] Finally, she testified that when a Communist went ''underground'' he concealed his name, his *address,* his *age,* his *job,* his social security number, etc. (Hearings, p. 6643).

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[4]Indeed, the close relationship between the Committee staff and the local "Red Squad" was acknowledged by the chairman at the conclusion of the hearings when he stated that the latter had "helped us materially in investigative work" (Hearings, Part 10 [Portland], June 19, 1954, p. 6723).

[5]Committee counsel announced that the Civil Rights Congress had been cited by the Attorney General as a subversive organization (Hearings, p. 6677).

Another witness, Homer Owen, testified to the existence of a Communist Party club at Reed College (Hearings, p. 6610), to the fact that Communist Party meetings were held at the homes of various members (Hearings, pp. 6610, 6622), and specifically at the home of Mrs. Don Wollam (Hearings, p. 6623), wife of appellant.[6]

The third "friendly" witness, Robert Canon, testified that appellant was a co-chairman of the Civil Rights Congress (Hearings, pp. 6675-76)[7] that there had been a Communist Party club at Reed College (Hearings, p. 6679), which met at the homes of various members (Hearings, p. 6680). He also testified that the homes of members were sometimes used as "mail drops" in the Communist Party "underground" (Hearings, pp. 6684-85, 6697).

This, then, was the "setting" (*Emspak v. United States,* 349 U.S. 190, 200; *Hoffman v. United States,* 341 U.S. 479, 488; *Jackins v. United States,* 231 F.2d 405, 407 [C.A. 9]) which confronted appellant when he was called as a witness. In addition, Committee counsel admitted that the reason appellant had been subpoenaed was because the Committee had "definite confidential information" that appellant had "associated with suspected Communists" (R 52). At the conclusion of his examination of appellant, the Com-

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[6]Owens also testified that one John Rogers MacKenzie was a member of the Communist Party (Hearings, p. 6614), and MacKenzie was specifically asked whether Communist Party meetings were held at his home (Hearings, p. 6654). MacKenzie is an appellant in case No. 14,745 now pending in this Court.

[7]See *supra,* p. 4, n. 5.

mittee counsel asked whether or not it was true that appellant was "at this very minute . . . a section organizer of District 11 Committee of the State of Oregon Communist Party . . .?" (Hearings, p. 6719).

After he was sworn, appellant was asked to state his present address and he declined to answer that question upon the ground, among others, "of the Fifth Amendment" (Hearings, p. 6716).[7a] While there was an initial direction to answer this question before appellant had completed a full statement of his reasons for his refusal, there was no direction to answer after appellant had completed stating those reasons and had specifically cited the Fifth Amendment (Hearings, pp. 6716-17).

Appellant was next asked, "What is your present employment?", and again he refused to answer that question and based his refusal in part "on the Fifth Amendment" (Hearings, p. 6717). Again, although there was an initial direction to answer, the chairman did not repeat the direction after appellant had completed the statement of his reasons for refusal.

The third question put to appellant was, "Did you ever attend elementary school, and if so, where?" (Hearings, p. 6717). Again appellant refused to answer the question, and there was an extended colloquy between him and the chairman, in the course of which the chairman directed him to answer a question different from that put by the Committee counsel

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[7a]The full transcript of appellant's testimony with respect to all five questions appears at pages 6716 to 6718 of the Hearings, and is reproduced below in full in footnotes 27 to 31, pages 30 to 35.

(Hearings, p. 6718) and never directed him to answer the question put by Committee counsel. In any event, appellant relied upon the "First and Fifth Amendments" in refusing to answer (Hearings, p. 6718). The fourth question asked appellant was, "Did you ever attend high school?" (Hearings, p. 6718), which appellant declined to answer for the reasons "cited earlier", and again, although he was directed to answer initially, the direction was not repeated after his completion of his statements for refusal. Finally, he was asked, "Did you ever attend college?", and appellant said that he refused to answer "for the same reason".

A series of questions all relating to appellant's alleged membership and activity in the Communist Party were also propounded, which appellant likewise refused to answer upon the ground that his answers might tend to incriminate him.

On July 23, 1954, the House of Representatives voted to certify appellant's refusal to answer the questions relating to his residence, employment and education, to the United States Attorney for prosecution (R 44, Ex. 5), and appellant was thereupon indicted for violation of 2 U.S.C.A. 192. The indictment charged that the questions were "pertinent to the question then under inquiry", and that appellant "refused to answer those pertinent questions" (R 3-4). The indictment did not allege how or in what manner the questions or any of them were pertinent to the inquiry, nor did it allege that appellant's refusal was wilful, unlawful or deliberate.

A motion to dismiss raising various points, including those raised on this appeal, was filed on behalf of appellant (R 5-6), as was a motion for the issuance of a *subpoena duces tecum* and for the inspection of documents in the possession of the Subcommittee's investigator (R 8-9). These motions were supported by affidavits (R 6, 10), the allegations of which were undenied. In the affidavits appellant asserted in effect that the Subcommittee already had the information it sought from him, that the questions were asked not to assist in the preparation of legislation, that in refusing to answer the questions appellant acted in good faith upon the advice of counsel and in the belief that he was entitled to the protection of the Constitution; and, with respect to the request for the *subpoena duces tecum,* that the evidence if produced would constitute a complete defense to the charge against him.[8] Both the motions were denied (R 19).[9]

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[8]The purpose (R 9-10) of the application for the subpoena was to demonstrate that the information sought by the Committee was already in its possession—as the record clearly demonstrates (R 67). While it may be that as a matter of law the Committee nonetheless had the "right" to make inquiry of appellant, the evidence sought to be adduced is not to be totally disregarded in considering either the *bona fides* of the investigation (*cf. United States v. Icardi*, 140 F.Supp. 383, 389 [D.D.C.]) or the "wilfulness" of appellant's refusals. The denial of his motion for the *subpoena duces tecum* erroneously prevented him from showing, if he could, that the case came within this rule.

[9]The printed transcript does not contain a copy of the order denying the motion to dismiss the indictment. This motion was captioned in a companion case *"Herbert Simpson v. United States of America"*, now pending in this Court, No. 14,743. A typewritten copy of the transcript of the proceedings of December 29, 1954, during the course of which the Court below denied the motion to dismiss the indictment, is on file with the Clerk of this Court.

The matter thereupon came on regularly for trial and at the conclusion of the Government's case a motion for judgment of acquittal was made pursuant to Rule 29, F.R. Crim. Pro. and was denied (R 79-80). Appellant was subsequently found guilty on all counts. A motion for new trial on the grounds that the indictment did not charge an offense and that the evidence did not support the verdict and was contrary to the law, was made and denied (R 30-31). Thereafter, appellant was sentenced to imprisonment and to pay a fine (R 31), and this appeal followed (R 32).

SPECIFICATION OF ERRORS.

1. The Court below erred in denying appellant's motion to dismiss the indictment since the indictment failed to allege facts showing the pertinency of the questions asked of appellant.

2. The Court below erred in denying appellant's motions for a judgment of acquittal and for a new trial since the evidence failed to establish beyond a reasonable doubt that the questions asked of appellant were pertinent.

3. The Court below erred in denying appellant's motion to dismiss the indictment since the indictment failed to allege facts showing that appellant's refusal to answer the questions was wilful.

4. The Court below erred in denying appellant's motions for a judgment of acquittal and for a new trial since the evidence failed to establish beyond a

reasonable doubt that appellant's refusal to answer the questions was wilful.

5. The Court below erred in holding that appellant was not entitled to invoke the privilege against self-incrimination to the questions asked.

6. The Court below erred in holding that appellant had been properly directed to answer the first four questions after he had claimed the privilege against self-incrimination.

SUMMARY OF ARGUMENT.

I(a). The indictment is required to set forth facts establishing every essential element of an offense. *United States v. Cruikshank,* 92 U.S. 542; *Morisette v. United States,* 342 U.S. 246. It is an essential element of the offense charged by 2 U.S.C.A. 192 that the question be "pertinent" to the inquiry. *Sinclair v. United States,* 279 U.S. 296; cf. *Quinn v. United States,* 349 U.S. 155, 161. This indictment fails to allege any facts from which pertinency can be established. Cf. *United States v. Lamont,* 18 F.R.D. 27, 35 (S.D. N.Y.);[10] *Bowers v. United States,* 202 F.2d 447 (C.A. D.C.).

I(b). The proof fails to establish the pertinency of the questions asked. *United States v. Kamin,* 135

[10]This case was affirmed on August 14, 1956, *United States v. Lamont* (C.A. 2, Docket No. 23,955), in an opinion in which the Court of Appeals spoke of the opinion here relied on in these words: "Judge Weinfield's scholarly opinion is reported at D.C. S.D. N.Y., 18 F.R.D. 27" (Court of Appeals, Slip Opinion, pp. 2024-25).

F.Supp. 382, 389 (D. Mass).[11] Cf. *Quinn v. United States,* 349 U.S. 155, 161.

II(a). It is an essential element of the offense charged by 2 U.S.C.A. 192 that the refusal to answer be wilful, deliberate or intentional. *In re Chapman,* 166 U.S. 661, 672; *Quinn v. United States,* 349 U.S. 155, 165; cf. *United States v. Murdock,* 290 U.S. 389. This indictment fails to allege facts from which such wilfulness or deliberateness can be established. *United States v. Lamont,* 18 F.R.D. 27, 32 (S.D. N.Y.)

II(b). The proof fails to establish beyond a reasonable doubt that appellant acted wilfully, *United States v. Murdock,* 290 U.S. 389.

III. In determining whether appellant was entitled to invoke the privilege against self-incrimination the Court must look to the "setting" in which the questions were asked. *Hoffman v. United States,* 341 U.S. 479; *Emspak v. United States,* 349 U.S. 190. In the setting revealed by this record, appellant was entitled to invoke the privilege. *Blau v. United States,* 340 U.S. 159; *Bart v. United States,* 349 U.S. 219; *Alexander v. United States,* 181 F.2d 480 (C.A. 9); *Jackins v. United States,* 231 F.2d 405 (C.A. 9); *Starkovich v. United States,* 231 F.2d 411 (C.A. 9). Appellant was therefore entitled to a judgment of acquittal.

IV. The Committee did not "demand" that appellant answer at least the first four questions after he

[11]The Court of Appeals for the Second Circuit said of Judge Aldrich's opinion in the *Kamin* case, that its reasoning was "convincing" and that his statement of the law was "cogent". *United States v. Lamont* (C.A. 2, Docket No. 23,955), Slip Opinion, p. 2031).

had invoked the privilege against self-incrimination. *Quinn v. United States,* 349 U.S. 155; *Fagerhaugh v. United States,* 232 U.S. 803 (C.A. 9). On the contrary, with respect to at least those questions, it "abandoned" the inquiry and turned to other matters without insisting upon an answer. Appellant was therefore entitled to a judgment of acquittal thereon. *Fagerhaugh v. United States, supra.*

ARGUMENT.

I.

THE INDICTMENT DID NOT PROPERLY CHARGE, NOR DID THE PROOF ESTABLISH, THE PERTINENCY OF THE QUESTIONS ASKED OF APPELLANT. (Specification of Errors 1 and 2.)

(a) The indictment did not properly charge the pertinency of the questions asked of appellant.

The statute under which appellant was prosecuted makes pertinency an essential element of the offense.[12] The Supreme Court has held that under this statute it is "incumbent upon the United States *to plead* and show that the question pertained to some matter under investigation" (*Sinclair v. United States,* 279 U.S. 263, 296-97).[13] This proposition has been universally accepted as the law in the lower federal courts. *Bowers v. United States,* 202 F.2d 447 (C.A. D.C.);

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[12] 2 U.S.C.A. 192 punishes the refusal to answer "any question *pertinent* to the questions under inquiry."

[13] Indeed, if the statute did not so require, the Constitution undoubtedly would impose such a requirement upon the prosecution. Cf. *Kilbourn v. Thompson,* 103 U.S. 168, 192-93; *McGrain v. Daugherty,* 273 U.S. 135, 173; *United States v. Rumely,* 345 U.S. 41, 46; *Quinn v. United States,* 349 U.S. 155, 161.

United States v. DiCarlo, 102 F.Supp. 597 (N.D. Ohio); *United States v. Kamin*, 135 F.Supp. 382 (D. Mass.); *United States v. Lamont*, 18 F.R.D. 27 (S.D. N.Y.); cf. *Seymour v. United States*, 77 F.2d 577 (C. A. 8); *Marcello v. United States*, 196 F.2d 437 (C.A. 5); *United States v. Orman*, 207 F.2d 148 (C.A. 3).

The requirement, springing from the Sixth Amendment and from Rule 7(c) F.R. Crim. Pro., that every essential ingredient of the offense be pleaded in the indictment, is not a mere technicality, but rather a matter of substance of the utmost importance. *United States v. Cruikshank*, 92 U.S. 542; *United States v. Carll*, 105 U.S. 611; *United States v. Hess*, 124 U.S. 483; *Morisette v. United States*, 342 U.S. 246.

In the case at bar the indictment is defective for failing to plead *facts* from which pertinency can be determined. Its reference to "Public Law 601, . . . and to H. Res. 5 . . ." (R 3) does not cure the defect. Those enactments merely set up the Committee and authorize it to investigate "(i) the extent, character and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of a form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto . . ." They do not establish the pertinency of the questions asked.

The fact that the indictment is generally in the language of the statute (2 U.S.C.A. 192) and makes reference to the enactments under which the Commit-

tee operates (P.L. 601 and H. Res. 5) "does not dispense with the necessity of alleging in the indictment all the *facts* necessary . . ." (*United States v. Carll, supra,* at 612-13).

It is impossible to determine from the indictment or the enactments how the questions asked of appellant relating to his residence, employment or education are relevant or pertinent to the inquiry authorized. Or, to put it conversely, ". . . the indictment is barren of any allegation of *fact* from which the authority of the . . . Subcommittee to conduct the inquiry can be ascertained" (*United States v. Lamont, supra,* at 35).

It will not do to suggest that answers to the questions sought, while in themselves not necessarily pertinent, might have led to other information conceivably pertinent. Such an approach to the question at bar would effectively destroy the requirement of pertinency, for any question put might conceivably lead to something relevant. *Bowers v. United States,* 202 F. 2d 447, 448 (C.A. D.C.); *United States v. Kamin,* 135 F.Supp. 382, 388-89 (D. Mass.).

For the foregoing reasons it is clear that the indictment failed to state *facts* sufficient to constitute an offense against the United States and that the motion to dismiss it should have been granted.

(b) The proof did not establish the pertinency of the questions asked of appellant.

As we have seen, the Government is required both to plead and "show" the facts establishing the pertinency of the questions asked. *Sinclair v. United*

States, 279 U.S. 263, 296-97. We have demonstrated above that the indictment failed to meet this test. We submit also that the proof was equally defective.

In an effort to establish the pertinency of the five questions, the Government, at the trial, inquired of Committee counsel as to the purposes for which the questions were asked. With respect to the questions concerning appellant's address and his present employment, Committee counsel stated that those questions were asked in order to identify the witness (R 57-58). With respect to the three questions concerning appellant's school attendance, Committee counsel stated that the Committee desired to know the extent of appellant's education in order to determine whether people who were involved in Communist activities are "educated" people (R 59).

It is hard to see how it was relevant or pertinent to the purposes of the Committee as outlined in the law and resolution creating it to determine who appellant was, where he lived, or where he had gone to school.

We are here dealing with a criminal offense and in determining whether the questions here were pertinent, the enactments authorizing the inquiry must be strictly construed. *United States v. Resnick,* 299 U.S. 207. Otherwise, the apparent breadth of the authorizing legislation may give rise to serious constitutional questions since the power to investigate is subject to definite constitutional limitations.

In a recent case involving the same law and resolution as is here presented the Supreme Court has said

that Congress' investigative power "cannot be used to inquire into private affairs unrelated to a valid legislative purpose" (*Quinn v. United States,* 349 U.S. 155, 161).[14] The inquiry here was clearly into appellant's "private affairs"—his residence, employment, education. There was no showing at the trial that these questions, dealing with matters of private concern to appellant, were pertinent to any proper Congressional inquiry, or indeed, how the answers sought would aid the Committee in discharging the tasks assigned to it by the law and the resolution. Where Donald Wollam lived or worked or where or whether he went to grammar school, can hardly be pertinent either to any valid legislative purpose or to the inquiry contemplated by the law and the resolution.

If it be argued that answers to these questions might lead to pertinent information, the answer is to be found in the cases already cited under Sub-Point (a) page 14, above. Indeed, as was said in *United States v. Kamin,* 135 F.Supp. 382 at 389:

> "The suggestion made in argument that a hostile witness could be asked an apparently impertinent question, or one in which any possible pertinence was remote, so that he would be lulled into answering it, may be good trial tactics, but it does not fall within the scope of the statute."

In the absence of proof establishing beyond a reasonable doubt how these questions were pertinent to the authority of the Congressional Committee as set

[14]Other constitutional limitations, not relevant to this particular point, were also suggested (349 U.S. at 161-62).

forth in the public law and resolution, appellant was entitled to a judgment of acquittal or to a new trial, and the denial of his motions for such relief was error.

II.

THE INDICTMENT FAILED TO ALLEGE, AND THE PROOF TO ESTABLISH, THAT APPELLANT'S REFUSAL TO ANSWER THE QUESTIONS WAS WILFUL. (Specification of Errors 3 and 4.)

(a) The indictment failed to allege that appellant's refusal to answer the questions was wilful.

While the word "wilfully" in the statute appears to modify only the clause relating to failure to appear,[15] the Supreme Court has held that a criminal intent is required before a witness may be found guilty of violating either portion of the statute. *Sinclair v. United States,* 279 U.S. 263, 299. It has said that the element of deliberateness is essential to a prosecution such as this. *In re Chapman,* 166 U.S. 661, 672; *Quinn v. United States,* 349 U.S. 155, 156.

Here the indictment failed, to plead either by way of fact or even conclusion, that the refusal was "wilful" or even that it was "deliberate" or "intentional". On the basis of the authorities already cited, Point I (a), page 13, above, the indictment was therefore fatally defective and it was error to deny the

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[15]"Every person who . . . wilfully . . . makes default, or who, having appeared, refuses to answer . . . shall be deemed guilty . . ." (2 U.S.C.A. 192).

motion to dismiss it. *United States v. Lamont,* 18 F.R.D. 27, 32 (S.D. N.Y.).

(b) The proof failed to establish that appellant's refusal to answer the questions was wilful.

The record of the proceedings before the Subcommittee shows that appellant's refusal was not wilful as that term has been interpreted by the Supreme Court.

In *United States v. Murdock,* 290 U.S. 389, a conviction was reversed because of a refusal to instruct that, in determining whether the defendant's refusal was wilful, the jury was to consider whether "the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief" (290 U.S. at 393). The Court said it was error to refuse such an instruction because as a matter of law the word "wilful" means "an act done with a bad purpose . . .; without justifiable excuse . . .; stubbornly, obstinately, perversely . . .; a thing done without ground for believing it lawful . . .; conduct marked by careless disregard whether or not one has the right so to act" (290 U.S. at 394-95).

The record here shows that at no time did appellant behave in a manner to warrant such a characterization of his conduct. On the contrary, he not only relied upon advice of counsel, but he advanced serious constitutional objections for his refusals to answer. We shall demonstrate below that those objections were well taken, and that in itself will be dispositive of this appeal. But be that as it may, it is clear from the record now before this Court that the reasons given

by appellant for his refusals to answer were given in good faith and were based upon his actual belief that such reasons were valid. He so asserted under oath,[16] and there is no evidence from which a contrary find- could have been made.

This element of wilfulness is particularly important in a case such as this where the witness is called upon to exercise the highest degree of legal skill, lest on the one hand he commit a contempt by a premature assertion of a constitutional privilege, or on the other, he answer a question which might result in his waiver of that privilege. Cf. *Rogers v. United States,* 340 U.S. 367, 378; *United States v. St. Pierre,* 132 F.2d 837 (C.A. 2).[17] Since the privilege which was here asserted "must be accorded liberal construction in favor of the right which it was intended to secure" (*Hoffman v. United States,* 341 U.S. 479, 486), and since it is not to be applied "narrowly or begrudgingly", or "treated as an historical relic" (*Quinn v. United States,* 349 U.S. 155 at 162), it cannot be said that a good faith invocation of the privilege, even if, as the Government will undoubtedly argue, it was premature, is evidence of that wilfulness or deliberateness required by the statute.

In the absence of evidence that appellant's refusals to answer were wilful and deliberate, indeed in the face of evidence that he relied in good faith upon his

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[16]Both in his testimony before the Subcommittee and in his affidavit in support of his motion to dismiss the indictment (R 7).

[17]"Plainly a witness need not have the skill of a lawyer to invoke the protection of the Self-Incrimination Clause" (*Quinn v. United States,* 349 U.S. 155, at 162).

belief that he had a right to invoke the privilege, the evidence plainly was insufficient. Appellant's motion for a judgment of acquittal or for a new trial should have been granted.

III.

APPELLANT WAS CLEARLY ENTITLED TO INVOKE THE PRIVILEGE AGAINST SELF-INCRIMINATION. (Specification of Error 5.)

A. The "setting" in which the questions were asked and the reasonableness of the fear of self-incrimination.

At this late date there can be no disputing the proposition that in order to sustain a claim of the privilege, such as was here asserted, "it need only be evident *from the implication of the question, in the setting in which it is asked,* that a responsive answer to the question or an explantion of why it cannot be answered *might* be dangerous because injurious disclosure *could* result" (*Hoffman v. United States,* 341 U.S. 479, 486-87). This test has been consistently applied for almost one hundred and fifty years. *United States v. Burr,* 25 Fed. Cas. 38, 40 (C.C. Va., per Marshall, C.J.); *Arndstein v. McCarthy,* 254 U.S. 71, 72; *Quinn v. United States,* 349 U.S. 155, 198-99; *Emspak v. United States,* 349 U.S. 190; *Maffie v. United States,* 209 F.2d 225, 231 (C.A. 1); *United States v. Weisman,* 111 F.2d 260, 261 (C.A. 2); *United States v. Coffey,* 198 F.2 438, 440 (C.A. 3); *Estes v. Potter,* 183 F.2d 865, 867 (C.A. 5); *Aiuppa v. United States,* 201 F.2d 287, 289 (C.A. 6); *Kiewell v. United States,* 204 F.2d 1, 5 (C.A. 8). This rule was clearly

stated in this circuit at the beginning of this decade in a series of cases involving grand jury investigations into Communist and subversive activities (*Alexander v. United States,* 181 F.2d 480 [C.A. 9]; *Doran v. United States,* 181 F.2d 489 [C.A. 9]; *Kasinowitz v. United States,* 181 F.2d 632 [C.A. 9]; *Healey v. United States,* 186 F.2d 164 [C.A. 9], and was recently reiterated in two cases arising out of the hearings of this very Subcommittee which took place in Seattle just prior to the hearings here involved (*Jackins v. United States,* 231 F.2d 405 [C.A. 9]; and *Starkovich v. United States,* 231 F.2d 411 [C.A. 9]).

An examination of the "setting" is therefore required in order to determine whether appellant's claim of the privilege was validly asserted. We have already summarized what had transpired prior to the time appellant was called to the witness stand (supra, pp. 2-7). It is clear that appellant had good faith reasons for believing that there was evidence tending to show (1) that Communists were seeking to "infiltrate" educational institutions, trade unions, and industry in general and the maritime industry in particular;[18] (2) that Communist Party units in the Portland area met at the *homes* of various members, including the home of appellant's wife, Mrs. Don Wollam; (3) that homes of Communist Party members were used as "mail drops" for the "underground"; (4) that there were Communist Party units

[18]It will be noted that appellant was apparently employed in the maritime industry (R 67) and was suspected of "infiltration" (R 50-51).

at Reed College in Portland; (5) that appellant, together with a person formerly associated with such Communist Party units had been a co-chairman of the Civil Rights Congress; (6) that the Civil Rights Congress was a Communist Party front organization and had been so designated by the Attorney General of the United States; (7) that the Communist Party was an international conspiracy which advocated not only forcible overthrow of government, but sabotage and possibly wartime espionage. The record may indeed be susceptible of a finding that appellant had good reason to believe that there was evidence tending to establish even further matters of this kind, but certainly the foregoing cannot be denied and is, we submit, more than an ample basis for the invocation of the privilege against self-incrimination.

It is clear that there are many crimes against the United States which a prosecutor could "conceivably . . . building on the seemingly harmless answer" (*United States v. Coffey,* 198 F.2d 438, 440 [C.A. 3]), fasten upon appellant. Among those crimes are various violations of the Smith Act (18 U.S.C.A. 2385), espionage (18 U.S.C.A. 793, *et seq.*), sabotage (18 U.S.C.A. 2151, *et seq.*), treason (18 U.S.C.A. 2381), seditious conspiracy (18 U.S.C.A. 2384), and many others.[19]

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[19]At about the time appellant was before the Committee, Congress was considering the Communist Control Act of 1954, 50 U.S.C.A. 841, *et seq.,* which

> ". . . enlarged even more the basis for claim of privilege, for it prescribes fourteen indicia of Communist membership. Some of them are entirely innocent of themselves, yet each is now declared by law to be evidence of membership, and

Nor must it be forgotten, in assessing the setting, that the very physical circumstances in which the interrogation took place put appellant on notice of the purpose of the Committee and others to establish his connections with the Communist movement. We refer not only to the announcement of the chairman and the press stories respecting the nature and purpose of the hearing,[20] but also to the presence of law enforcement officers charged with ferreting out subversion. As this Court recognized in *Jackins v. United States,* 231 F.2d 405, 409 (C.A. 9), in reliance upon *Hoffman v. United States,* 341 U.S. 479, 489, and *Aiuppa v. United States,* 201 F.2d 287, 299 (C.A. 6), the attendance of law enforcement officers and investigators for prosecuting agencies is a matter not to be overlooked in weighing the good faith of the witness' claimed fear of incrimination.

B. Answers to the questions asked could have incriminated appellant.

1. It requires no great acumen to perceive that if appellant had answered the question concerning

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in conjunction they seem to provide a virtually unlimited basis for invoking the Fifth Amendment" (Telford Taylor, *Grand Inquest,* Simon & Schuster, 1955, p. 204).

At the time he testified Congress had not yet enacted the Immunity Statute, 18 U.S.C.A. 3486, pursuant to which the Committee might have tendered appellant immunity from prosecution for any of the crimes mentioned above. Cf. *Ullman v. United States,* 350 U.S. 422. Of course, no such immunity was ever offered to appellant.

[20]Matters which this Court has said it is error to ignore in cases of this kind. *Alexander v. United States,* 181 F.2d 480 (C.A. 9); *Doran v. United States,* 181 F.2d 489 (C.A. 9); *Kasinowitz v. United States,* 181 F.2d 632 (C.A. 9); *Healey v. United States,* 186 F.2d 181 (C.A. 9). Cf. *Emspak v. United States,* 349 U.S. 200.

his address, he might have identified his home as a place where Communist Party clubs conducted meetings or as a place to which he had repaired as a member of the Communist "underground", or perhaps as a place which the "underground" used as a "mail drop". All such matters had been already testified to before appellant was called as a witness.[21] The question as to appellant's residence appears to present a problem in no way analytically different from the similar question presented by the record in *Starkovich v. United States,* 231 F.2d 411 (C.A. 9). There this Court held that in the "setting" in which the question was asked—a setting indistinguishable from that presented by this record—the witness had a justifiable fear of incrimination and reversed the conviction.

2. As to the question relating to his employment, we need hardly pause over the evidence the Committee already had, and the further evidence it was seeking with relation to Communist Party infiltration in unions or on the waterfront; for any conceivable uncertainty is resolved by a consideration of the last questions put to appellant by Committee counsel:

> ". . . isn't it true that you are today—this very minute . . .—a section organizer of District 11

[21] In one of its briefs in several of the Smith Act cases presently pending before the Supreme Court, the Government cites, as evidence to support convictions under that statute, testimony relating to "facilities" in the "underground organization" relating to "hiding places and contact places [for] party leaders . . ., drop places where party material can be dropped and picked up . . ." (Brief for the United States, *Yates, et al. v. United States,* Supreme Court, October Term, 1956, Nos. 6, 7 and 8, p. 172).

> Committee of the State of Oregon Communist Party?
>
> * * *
>
> "Mr. Wollam, have you ever engaged in espionage activities against the United States?" (Hearings, pp. 6719-20).

Indeed, even if his employment were "innocent", appellant might have obtained it as part of his disguise in the "underground". Such matters, too, had been testified to before appellant was called. The question as to appellant's employment therefore appears to be in no respect different from the question involved in the first count in *Jackins v. United States,* 231 F.2d 405 (C.A. 9). There this Court had no difficulty in finding that the setting justified the invocation of the privilege against a seemingly innocuous question as to employment history (231 F.2d at 407). The conviction there was reversed with directions to enter a judgment of acquittal.[22]

3. In view of the emphasis which the investigation had placed upon Communist Party infiltration into the educational system, and in view of the testimony already given connecting appellant as co-chairman of a subversive group together with the former Director of Admissions and Dean of Students at Reed College, his refusal to answer questions regarding his educational background was clearly privileged. Indeed, if appellant had the kind of contacts and associations

[22]In the earlier cases cited, *Alexander, Doran, Kasinowitz,* and *Healey, supra,* pp. 3-4, this Court sustained a claim of the privilege against questions seeking information about employment in settings not dissimilar to that presented here.

with Communists which Committee counsel claimed, his answers to these questions might well have revealed them. He was therefore privileged not to answer these questions as well.

If it be suggested that the two questions relating to appellant's pre-college education were too "remote" to justify the invocation of the privilege, it need only be remembered first, that the cases have held that an answer which could conceivably furnish a "link in a chain" need not be given; second, that the cases have held that the privilege is not to be "begrudgingly" applied or a witness stripped of its protection by skillfully drawn questions which might entrap him; and third, that the Attorney General and the Committee have never suggested that Communist infiltration or indoctrination is limited to educational institutions on a college level. Indeed, the Attorney General's list of subversive organizations contains reference to groups of young people of elementary and secondary school age,[23] as do publications of Congressional Committees dealing with this and related problems.[24]

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[23]See, e.g., List of Organizations Designated by the Attorney General Pursuant to Executive Order No. 9835, 5 C.F.R. § 210.15, Appendix A, which includes among others: American Youth Congress, American Youth for Democracy, Connecticut State Youth Conference, Socialist Youth League, Southern Negro Youth Conference, Youth Communist League.

[24]See, for example, Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, 82nd Cong., 1st and 2nd Sess.—Communist Tactics in Controlling Youth Organizations (Gov. Printing Office, 1952), pp. 24-25, 210-217, dealing with "sub-

In view of the foregoing, it is clear that appellant's claim of the privilege was properly invoked. For, as was said in *Hoffman v. United States,* 341 U.S. 479, at 488:

> "In this setting it was not '*perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot *possibly* have such tendency' to incriminate."

A very recent case in New York throws a good deal of light on the point. There the Court of Appeals affirmed a contempt conviction for a refusal to answer questions propounded in a grand jury proceeding. *United States v. Trock,* 232 F.2d 839 (C.A. 2). District Judge Galston held, with the reluctant concurrence of Chief Judge Clark, and over the vigorous dissent of Circuit Judge Medina that the defendant had made his claim of the privilege "prematurely"; and that before he could validly refuse to answer them, the questions were required "to present a 'hot pursuit' " situation (232 F.2d at 843). In a well-reasoned dissent Judge Medina pointed out how the position taken in the affirming opinions—the requirement that the questions themselves show that the prosecution was in "hot pursuit"—was contrary both to the decided cases and to the underlying rationale of the Fifth Amendment.

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version" in high schools and at an even younger age level. Indeed, the record at bar contains an identification of others beside college students as members of the Communist unit at Reed College (Hearings, p. 6612).

Judge Medina concluded his dissent by saying:

> "Despite all the hue and cry against the Fifth Amendment it still stands as one of our fundamental constitutional rights and we must be zealous to preserve it, rather than to weaken and dilute it by interpretations of doubtful validity" (232 F.2d at 846).[25]

The subsequent history of this case is most significant, representing as it does the latest expression of the Supreme Court's views on the issues here presented. On a petition for writ of certiorari to review the holding of the Second Circuit, the Supreme Court on June 11, 1956, the last day of its last term, entered the following order:

> "Per Curiam: The petition for writ of certiorari is granted and the judgment is reversed. Hoffman v. United States, 341 U.S. 479, 95 L.ed. 1118, 71 S.Ct. 814" (*Trock v. United States,* 351 U.S. 976).

It is significant that the Court did not even set the matter down for argument on the merits, but instead, regarding the question as closed, summarily directed a reversal. The law is so well established now that there was nothing else for the Court to do.[26]

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[25]Judge Medina recently delivered the Alexander Morrison Lecture at the 1956 annual convention of the California State Bar. At a press interview in connection with this event, the judge is quoted as saying:

> "I would rather see every single Communist go scott free than abandon, diminish or dilute a single one of our constitutional amendments, and that includes the Fifth Amendment" (*The Recorder,* September 21, 1956).

[26]Such summary reversal occurs "where the decision below is so clearly erroneous as to make argument before the Court a waste of time" (Stern & Gressman, *Supreme Court Practice* [2d ed.], p. 156).

Appellant's claim of the privilege here was clearly valid, and his motion for a judgment of acquittal was erroneously denied.

IV.

THE APPELLANT WAS NOT PROPERLY DIRECTED TO ANSWER THE QUESTIONS REFERRED TO IN COUNTS I THROUGH IV OF THE INDICTMENT.

As an additional reason for requiring the reversal of the judgment, with direction to enter a judgment of acquittal respecting the questions involved in the first four counts of the indictment at least, it is submitted that the record fails to show the necessary "demand" for answer after appellant's invocation of the privilege. Under recent decisions of the Supreme Court and of this Court, appellant was therefore entitled to a judgment of acquittal. *Quinn v. United States,* 349 U.S. 155; *Emspak v. United States,* 349 U.S. 190; *Bart v. United States,* 349 U.S. 219; *Fagerhaugh v. United States,* 232 F.2d 803 (C.A. 9); *Jackins v. United States,* 231 F.2d 405, 406-07 (C.A. 9).

These cases, so recently decided, are undoubtedly so fresh in the Court's mind as to require no great rehearsal of their holdings here. Suffice it to say that they require as a precondition of a contempt conviction that the Committee "clearly" apprise the witness that despite his objections it "demands" his answer. This the Committee here failed to do, at least with respect to the questions embraced in the first four counts of the indictment.

1. As to the first question, the situation was that after it was put, appellant commenced to state his grounds for refusing to answer. Before he had completed his statement, indeed before he had made his claim of the privilege under the Fifth Amendment, he was directed to answer the question. After that direction he asked leave to "continue my reasons for not answering that question" (Hearings, p. 6716).[27]

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[27]The entire colloquy with respect to the first question is here set out:

Mr. Kunzig. Thank you, Mr. Goodman. Mr. Wollam, what is your present address, sir?

Mr. Wollam. Mr. Kunzig, I refuse to answer that question on the first, under the fourth amendment because I believe that counsel is aware that people who have given their address over this microphone both here and in Seattle have had their homes threatened. I have a wife and family at home who I don't propose to put in jeopardy because of any action I may take here.

Mr. Kunzig. Just shorten it up.

Mr. Velde. You may state your legal grounds.

Mr. Wollam. I don't like your question, Mr. Kunzig, and I will certainly not surrender to you any right that I may have to——

Mr. Velde. You may state your legal grounds, young man, but we're not going to listen to another tirade. Do you have contempt in you heart, when you approach the witness stand, do you have contempt in your heart for this Committee of your United States Congress?

Mr. Wollam. I refuse to answer that question on the grounds of the fifth amendment, the decision of United States judge, James Alger Fee, in the case of the United States versus——

Mr. Velde. It is apparent that this witness is trying to filibuster. We just can't have that, as I pointed out the other day.

Mr. Kunzig. Mr. Chairman, I respectfully request, in order that the record may be clear and that the witness be warned that there is possible contempt here that he be directed to answer the question as to, that I have just asked, as to his address.

Mr. Velde. Yes. You are certainly directed to answer that question.

Mr. Wollam. Mr. Chairman, I ask to continue my reasons for not answering that question.

He thereupon and for the first time, cited the Fifth Amendment as the ground for refusing to answer, At no time thereafter was he told that nonetheless his answer was demanded. After some further colloquy, none of which included a demand that he answer the question, the chairman directed Committee counsel to "proceed to ask the questions", and Committee counsel put the next question (Hearings, p. 6717).

This situation is identical with that presented in *Fagerhaugh v. United States,* 232 F.2d 803 (C.A. 9) where, at 804, it is pointed out that while there was a direction to answer *before* the claim of the privilege against self-incrimination, there was none after that privilege had been asserted. As that conviction was reversed, so must this one be.

Mr. Velde. You have already stated sufficiently the grounds. Now do you refuse to answer?

Mr. Wollam. I have only stated the fourth amendment.

Mr. Velde. Do you refuse to answer upon direction the question as to your address?

Mr. Wollam. I do refuse to answer that question. First on the grounds that I have just stated under the fourth amendment to the Constitution. Secondly I refuse to answer again on the grounds that I have just stated regarding the Alger Fee decision. I refuse to further answer that question under the 1st, the 5th, the 9th, and the 14th amendments to the Constitution of the United States and any other sections of the Constitution that may apply, and also the constitution of the State of Oregon.

Now this may be funny to you, Mr. Kunzig.

Mr. Kunzig. It is not funny.

Mr. Velde. It is very, very serious.

Mr. Kunzig. It is very, very serious.

Mr. Velde. You are the one who is taking this as being funny.

Mr. Wollam. I certainly have no intentions——

Mr. Velde. Proceed to ask the questions, Mr. Counsel." (Hearings, pp. 6716-17.)

2. The situation with respect to the second question is much the same.[28] Although in this case the direction to answer came after the witness had claimed his Fifth Amendment privilege, it came before he had completed assigning all of his reasons for his refusal to answer. Indeed, while he was still stating the balance of his reasons for his refusal, the chair apparently acquiesced, for it interrupted him and said to Committee counsel, "All right, proceed, Mr. Counsel" (Hearings, p. 6717).

It is submitted, with respect to this question that the Committee "abandoned the question and pro-

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[28]The full colloquy is:

"[Mr. Kunzig.] Now, Mr. Wollam, what is your present employment? I am asking that question very seriously.

Mr. Wollam. And I will give you a very serious answer.

Mr. Kunzig. Thank you.

Mr Wollam. Mr. Kunzig, I refuse to answer it not just on the fifth amendment, as you stated that you would understand my refusals would be based upon, but upon all of the grounds that I have previously stated.

Mr. Kunzig. All right. Mr. Chairman, may I ask you to please direct the witness to answer the question as to where he is presently employed.

Mr. Velde. Yes; you are directed to answer the question as to your employment at the present time.

Mr. Wollam. I refuse to answer the question upon the grounds of the first and fifth amendment to the Constitution of the United States pursuant to article 1, section 10, Constitution of Oregon, which provides in part; that every man shall have——

Mr. Velde. Isn't your refusal——

Mr. Wollam (continuing). Remedy by due course of law for injury done him——

Mr. Velde. Will the witness listen to me for just a minute? Is your refusal to answer based upon the same reasons that you gave before? Is that right?

Mr. Wollam. My refusal to answer is based upon the reason that I just gave plus all else that I have pled here, and I beg leave, Mr. Chairman, I beg leave——

Mr. Velde. All right, proceed, Mr. Counsel." (Hearings, pp. 6717.)

ceeded to inquire about other matters" (*Fagerhaugh v. United States, supra,* at 805). Thus appellant may not now be held in contempt for his refusal to answer.

3. With respect to the third question the record reveals a direction to answer a question different from the one originally put, and a failure to direct an answer after the claim of the Fifth Amendment privilege had been clearly made.[29] On the contrary, after

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[29] "Mr. Kunzig. Now Mr. Wollam, the next question is as follows: Did you ever attend elementary school and if so where?

(Witness confers with counsel.)

Mr. Wollam. Mr. Chairman, in the dissenting opinions of Justices Douglas, Black, and Frankfurter the line of demarcation——

Mr. Velde. Young man, we are not going to listen to a long diatribe or a lot of advice on what the law is, as far as the Supreme Court decisions are concerned. Either answer the questions or refuse to answer. I will say this that if you will answer the questions as put to you by our counsel, then you might have the opportunity to go ahead and explain the law or anything that you want to, but you must first of all give us the courtesy of giving us an answer. By that I mean an answer of yes or no.

Mr. Wollam. I have refused to answer the question Mr. Chairman and I ask you for the courtesy of being permitted to state my reasons.

Mr. Velde. You have stated the reasons.

Mr. Wollam. I think these reasons are quite important. They are very important to me.

Mr. Velde. Will you proceed, Mr. Counsel?

Mr. Kunzig. Mr. Chairman, I think that we also ought to note that he was citing the dissenting opinions. This committee usually tries to follow the majority opinion of the Supreme Court.

Now on the last question you have refused. Now let me ask you this. Mr. Chairman, I have forgotten the record. Have you directed him to answer the question as to whether he went to the elementary school or not?

Mr. Velde. No.

Mr. Kunzig. Would you please direct him?

Mr. Velde. You are directed to answer the question as to where you attended elementary school, or whether you attended elementary school.

appellant made that claim, the chairman accused him of making "wild and absurd and ridiculous statements"; said, "[w]e are not going to listen to anything further"; and asked Committee counsel if he had any other "important" questions he wanted to ask. Committee counsel thereupon proceeded with further questions (Hearings, p. 6718). Again, there appears to have been no clear demand that the question be answered. Rather, it appears that the Committee abandoned the question and asked another one.

4. The record with respect to the fourth question[30] reveals the same failure to make the required demand

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Mr. Kunzig. The question was where you attended and where was the exact way that I put it.

Mr. Wollam. Mr. Chairman, in view of the fact that I have no way of knowing as what time when I answer a question I will be waiving my rights to refuse to answer further questions that I know will follow from this committee, and since I have no intention of becoming a member of your stable of stool pigeons I am going to stand upon my constitutional rights and decline to answer the question upon the grounds of the first and fifth amendments and——

Mr. Velde. Now we are not going to listen to any more of this diatribe such as calling us a stable of stool pigeons. I am sure that your mother wouldn't appreciate your saying something like that and I am sure that the rest of the decent people in this area don't appreciate your making such wild and absurd and ridiculous statements, and so we are not going to listen to anything further.

Counsel, do you have any other important questions that you want to ask this witness?" (Hearings, pp. 6717-18).

[30] "[Mr. Kunzig]. Did you ever attend high school, Mr. Wollam?

(Witness confers with counsel.)

Mr. Wollam. As an overseas war veteran, Mr. Chairman; 11 months in German prison camp, I stand upon the Constitution of the United States, the same provisions that I cited earlier.

Mr. Kunzig. Now did you ever attend college, Mr. Wollam? Mr. Chairman, will you please direct the witness to answer that question?

after the witness had made his claim of the privilege, as well as an apparent abandonment of the question, since it shows that the witness was interrupted in his explanation and a new question put to him.

It is submitted that the record in this case reveals that as to each of the first four questions[31] there was not such a clear, definite and unambiguous "demand" from the Committee as to invest appellant's refusal with that wilfulness required to be present before a conviction may be sustained. For this additional reason the convictions on the first four counts cannot stand.[32]

Mr. Velde. Yes, you are directed to answer the question as to your—was it high school? Was that the last question?

Mr. Kunzig. Yes, high school. The question exactly as it appears in the record.

Mr. Wollam. And I will again decline to answer and on the same grounds that I gave before. And I might add, Mr. Chairman, that if you are interested——" (Hearings, p. 6718).

[31]The record as to the fifth question reads quite simply:

"Mr. Kunzig. Did you ever attend college?

Mr. Wollam. The same answer and the same reason.

Mr. Kunzig. I respectfully request that the witness be directed, Mr. Chairman, to answer the question.

Mr. Velde. Yes, you are directed to answer.

Mr. Wollam. I refuse to answer, Mr. Chairman, same reason" (Hearing, p. 6718).

[32]As in *Jackins v. United States*, 231 F.2d 405 (C.A. 9), the judgment of conviction on the various counts may be reversed on a variety of different grounds. The argument made in this point as to the first four counts of the indictment is not intended to, and does not detract from the validity of the arguments heretofore made. Instead, it supplements them and gives an additional ground for reversal as to the first four counts. For each or any of the reasons set forth in Points I, II and III, *supra*, we submit that the judgment as to all five counts must be reversed.

CONCLUSION.

We have shown that the judgment against appellant must be reversed because the indictment upon which he was brought to trial was defective for failing to allege facts showing the pertinency of the questions asked him or the wilfulness of his refusal to answer them. Nor does the evidence introduced against appellant establish beyond reasonable doubt that the questions were pertinent to the inquiry or that appellant did not in good faith believe his refusal to answer was a privileged one. We have also shown that the record reveals a serious question as to whether, as to four of the questions at least, appellant was clearly apprised that his answer was demanded.

Finally, and going to the heart of the case, we submit that notwithstanding how the Court decides any of the foregoing issues, appellant's refusal to answer was in fact and in law protected by the Fifth Amendment privilege against self-incrimination.

For the foregoing reasons—or any one of them—the judgment below must be reversed with directions to enter a judgment of acquittal.

Dated, San Francisco, California,
October 15, 1956.

Respectfully submitted,
GLADSTEIN, ANDERSEN, LEONARD
& SIBBETT,
NORMAN LEONARD,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

HEARING BEFORE THE COMMITTEE ON UN-AMERICAN ACTIVITIES, HOUSE OF REPRESENTATIVES, Eighty-Third Congress, Second Session, June 18, 1954—Investigation of Communist Activities in the Pacific Northwest Area—Part 9 (Portland); and June 19, 1954, Part 10 (Portland).

EXCERPTS FROM TESTIMONY

(P. 6605):

"(Mr. Velde) . . . The investigation will resolve largely around communistic influences in this area.

Communism is, of course, the clear and present danger to our constitutional liberties. The Communist Party, we know after long periods of study, many long hearings which we have engaged in, is a conspiracy. It is designed to overthrow our form of government by force and violence."

(P. 6610):

"Mr. Kunzig. Mr. Owen, figuring out your age at the present time, you were then about 23 when you joined the Communist Party? That is roughly correct; is it not?

Mr. Owen. Roughly, yes.

Mr. Kunzig. What club of the Communist Party in this area did you join?

Mr. Owen. The John Reed Club.

Mr. Kunzig. Would you tell the committee please something about the John Reed Club; where it met, what it was and as much as you can recall.

Mr. Owen. Basically it was a club composed of college students. Most of those students attended Reed College.

Mr. Kunzig. You mean this particular Communist Party group was actually composed of students of college age here in this area?

Mr. Owen. That's right.

Mr. Kunzig. Where did you meet?

Mr. Owen. We met at different people's homes, including our own. Always, as far as I can recall, in homes and not on campus.

Mr. Kunzig. I see. Now roughly what was the membership of this group?

Mr. Owen. It ranged from oh, approximately 15 at the time I joined to about 5 when I quit or left Oregon in late 1950."

(P. 6614):

"Mr. Kunzig. Now are there any other members of the John Reed Club? You mentioned last Dave Lapham.

Mr. Owen. Mr. and Mrs. John MacKenzie, M-a-c-K-e-n-z-i-e, who joined the party in the fall of 1947."

(Pp. 6622-23):

"Mr. Owen. I attended a functionaries' meeting of those who were officials of various clubs at the home of Dirk DeJonge. D-i-r-k D-e-J-o-n-g-e.

Mr. Kunzig. What are Communist Party functionaries, Mr. Owen?

Mr. Owen. They consist of the chairman, treasurer, secretaries of the individual clubs.

Mr. Kunzig. Of the Communist Party?

Mr. Owen. Yes.

Mr. Kunzig. Are there any others? Can you identify, before I go further, this Mr. DeJonge, his residence, home or anything of that nature?

Mr. Owen. His home is located in southeast Portland or was at that time.

* * *

Mr. Kunzig. Any others?

Mr. Owen. Mrs. Don Wollam. W-o-l-l-a-m. I attended a meeting in her home which she also attended."

(Pp. 6636-38):

"Mr. Velde. Perhaps you might note the citations of the Civil Rights Congress, Mr. Counsel, if you could supply—find them—in a hurry?

Mr. Kunzig. The Civil Rights Congress, Mr. Chairman, and for the record, has been cited as subversive and Communist by Attorney General Tom Clark in 1947, and again in 1948. It has been cited by this committee in 1947 as an organization formed as a merger of two other Communist-front organizations: the International Labor Defense and the National Federation for Constitutional Liberties, dedi-[6637] cated not to the broader issues of civil liberties but specifically to the defense of individual Communists and the Communist Party and controlled by individuals who are either members of the Communist Party or openly loyal to it.

* * *

(Mrs. Hartle). The Civil Rights Congress in Seattle was completely under Communist domination at the time that I left Seattle."

(P. 6643):

"(Mrs. Hartle). Going underground simply meant that you disappeared from the present scene; you took another name, you took another social-security number, you took another age, you changed your identity in such a way that you would not be recognized by anyone, by authorities or others."

(P.p. 6644-45):

"(Mrs. Hartle) . . . But as far as youth in general is concerned, the Communist Party attaches a great deal of importance to work among youth. This is true internationally and it is true of the Communist Party of the U.S.

A. In the Northwest district, as a district board member, I was as-[6645]signed to head the district youth work and it was considered an important assignment to build the Labor Youth League, to penetrate the universities, the campus organizations of the University of Washington and other colleges and to do work in high schools as well.

Mr. Kunzig. I realize that to a great extent that you were largely in the Washington area. We had testimony here this morning, sworn testimony, about a Communist Party cell at Reed College. I wonder if that in any way came to your attention?

Mrs. Hartle. Especially during the 1930's I heard many reports at district plenums, that is enlarged district committee meetings, I heard many reports that spoke of the success and work of the Communist Party at Reed College. By the 1940's, and that was at those times fairly well detailed and fairly well

given in detail; however, by the time of the 1940's while Oregon was still in the district, the reports would be more general, but it was well understood by the district leadership and spoken of in private conferences that from time to time there was varying success at Reed College. I have always known that the Communist Party in Oregon had some kind of contact through students and sometimes through teachers at Reed College."

(P. 6649):

"Mr. Kunsig. You said that the concentration policy of the Oregon section was directed toward lumber. Is there any other concentration of any other kind in any other direction in addition to that?

Mrs. Hartle. One of the other concentrations in Oregon, and especially the Portland area, was the concentration of the maritime industry and unions. That was another important Oregon concentration."

(P. 6654):

"Mr. Kunzig. Isn't it a fact, Mr. MacKenzie, that Communist Party meetings were held in your home?

Mr. MacKenzie. Mr. Chairman, I refuse to answer that question on the grounds of the fifth amendment."

(Pp. 6675-76):

"Mr. Canon. Yes; I was the cochairman of the Civil Rights Congress when it was organized. I don't recall the year. I would judge 1947. I would think that it was 1947. Don Wollam and I——

Mr. Kunzig. Would you spell that name, please?

Mr. Canon. I believe it is W-o-l-l-a-m. I can't tell you. I don't know.

Mr. Kunzig. W-o-l-l-a-m, Don Wollam; yes——

* * *

(Mr. Canon). Don Wollam and I did cochair it. We went about as far as to have letterheads, stationery printed, a number of national officers. Actually we did practically no work. There was no issue before us."

(P. 6677):

"Mr. Kunzig. Mr. Chairman, I think the record should show that, at this point, that the Civil Rights Congress was declared subversive and Communist by Attorney General Tom Clark on December 4, 1947. That was released at that time all over the country."

(P. 6679):

"Mr. Kunzig. Now did you join any particular club of the Communist Party?

Mr. Canon. Yes, I joined what was known as the professional club.

Mr. Kunzig. The professional club of the Communist Party?

Mr. Canon. That's right.

Mr. Kunzig. What did that mean, the professional club?

Mr. Canon. Well, there were many clubs. Each had a name. Ours was no more exclusively professional than several others. Our particular club was made up primarily of people whose interests and livelihood were centered around Reed College. It was a very small club, and the party went through several

reorganizations at that time, organizing clubs on the basis of neighborhood and then organizing clubs on the basis of common industry, and so forth, but ours remained stable throughout the period as a group of people who normally associated in Reed College."

(P. 6680):

"Mr. Kunzig. Where did you meet?

Mr. Canon. In one of our homes. We would rotate in our homes . . ."

(Pp. 6684-85):

"Mr. Canon. The only other significant role that my wife and I took, we were for a short period of time, I don't remember the dates or the time, but what might be called a mail drop for the downstate party people. I think it was at the time that the party was becoming a little apprehensive about its mail being tampered with and the club dues were sent to us, addressed to us personally, and came to our house, and we then in turn, turned the dues over to Mrs. Simpson, who would come from the party office to pick them up.

Mr. Kunzig. Give us a little further information. We have heard that term before, but there might be many who don't understand what the term 'mail drop' means. Tell us a little more about a mail drop.

Mr. Canon. I don't know that I can tell you much more about it. We were simply asked if we would mind using our address as a receiving address for Communist dues around State, and we said, 'All right,' [6685] and so the dues from the various parties, from the various clubs, were sent to us, and we

didn't open the mail. We simply collected it and passed it on to a courier from the central office."

(P. 6697):

"Mr. Canon. To tell you the truth, I had forgotten. I didn't mention to Mr. Kunzig this mail-drop business. It completely slipped my mind until that Captain Brown mentioned it to me this morning."

(P. 6719):

"Mr. Kunzig. Now we will go right on and let me ask you if it isn't true, and I repeat what you said a little earlier that we don't consider this to be funny at all, isn't it true that you are today—this very minute as you are sitting here in this courtroom of the United States courthouse before the Congress of the United States of America—a section organizer of District 11 Committee of the State of Oregon Communist Party right now in 1954? Isn't that correct?

Mr. Wollam. I refuse to answer that question on all the grounds I just gave Mr. Chairman."

(P. 6723):

"(Mr. Velde). And then to the Portland city police, particularly Capt. Bill Brown and Detective Bob Beaubelle. They have helped us materially in investigative work and they have assisted our staff in all ways possible . . ."